

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION**

STATE OF TEXAS; STATE OF
LOUISIANA,

Plaintiffs,

v.

The UNITED STATES OF AMERICA;
ALEJANDRO MAYORKAS, Secretary of the
United States Department of Homeland
Security, in his official capacity; UNITED
STATES DEPARTMENT OF HOMELAND
SECURITY; TROY MILLER, Senior Official
Performing the Duties of the Commissioner of
U.S. Customs and Border Protection, in his
official capacity; U.S. CUSTOMS AND
BORDER PROTECTION; TAE JOHNSON,
Acting Director of U.S. Immigration and
Customs Enforcement, in his official capacity;
U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT; TRACY RENAUD,
Senior Official Performing the Duties of the
Director of the U.S. Citizenship and
Immigration Services, in her official capacity;
U.S. CITIZENSHIP AND IMMIGRATION
SERVICES,

Defendants.

Civ. Action No. 6:21-cv-00016

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs submit the following Notice of Supplemental Authority to advise the Court of two orders issued yesterday by the en banc United States Court of Appeals for the Fifth Circuit

regarding the motions panel’s September 15, 2021 order that partially stayed this Court’s preliminary injunction entered in this case. *Texas v. United States*, 14 F.4th 332 (5th Cir. 2021) (the “Stay Order”). First, the court granted Plaintiffs’ Petition for Rehearing En Banc and vacated the Stay Order. *Texas v. United States*, No. 21-40618, Doc. 00516111350 (5th Cir. Nov. 30, 2021) (attached as **Exhibit A**). Hours later, the court issued an order clarifying that the appeal of the Stay Order would be heard by a three-judge panel—rather than the en banc court—“in due course” but confirmed its earlier vacatur of the Stay Order. *Id.* at 00516112252 (attached as **Exhibit B**).

During the status conference held October 7, this Court inquired about the effect that the reasoning of the Stay Order should have on this litigation going forward, ECF No. 107, and the parties extensively addressed the effect of the Stay Order in their briefing on the pending Plaintiffs’ Motion to Postpone the Effective Date of Agency Action or, in the Alternative, for Preliminary Injunction (the “Motion to Postpone”). ECF No. 111; *see also* ECF Nos. 122, 128.

Plaintiffs have consistently advanced the position that this Court is in no way bound by the reasoning in the Stay Order, while Defendants have relied on it extensively as precluding the relief requested in the Motion to Postpone. Now that the Stay Order is no more, even that phantom poses no obstacle to this Court applying its previous reasoning from its order preliminarily enjoining the now-superseded prioritization memoranda. ECF No. 79.

When a court decision is vacated its “ruling and guidance” are “erased” and of no precedential value. *United States v. Windsor*, 570 U.S. 744, 761 (2013); *see also United States ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384, 389 (5th Cir. 2008) (noting that the “panel opinion upon which Marcy relies was automatically vacated when it was reheard *en banc*,” so the “panel opinion is not precedent”); *United States v. Pineda-Ortuno*, 952 F.2d 98, 102 (5th Cir. 1992) (because “rehearing en banc has been granted . . . the panel decision is vacated and of no

precedential value”) (citing 5th Cir. R. 41.3).

If there had been any doubt, yesterday’s orders from the Fifth Circuit confirm that this Court should not be constrained by the reasoning of the Stay Order when considering the Motion to Postpone.

Date: December 1, 2021

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

PATRICK K. SWEETEN
Deputy Attorney General for Special Litigation
Attorney-in-Charge
Texas Bar No. 00798537
Southern District of Texas Bar No. 1829509
patrick.sweeten@oag.texas.gov

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General

WILLIAM T. THOMPSON
Deputy Chief, Special Litigation Unit
Texas Bar No. 24088531
Southern District of Texas Bar No. 3053077
will.thompson@oag.texas.gov

/s/ Ryan D. Walters
RYAN D. WALTERS
Special Counsel
Texas Bar No. 24105085
Southern District of Texas Bar No. 3369185
ryan.walters@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548
Tel.: (512) 463-2100
Fax: (512) 457-4410

COUNSEL FOR PLAINTIFF STATE OF TEXAS

JEFF LANDRY
LOUISIANA ATTORNEY GENERAL

/s/ Joseph S. St. John
ELIZABETH B. MURRILL
Solicitor General
JOSEPH S. ST. JOHN
Deputy Solicitor General

Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

COUNSEL FOR PLAINTIFF STATE OF LOUISIANA

CERTIFICATE OF COMPLIANCE

I certify that the total number of words in this response, exclusive of the matters designated for omission, is 427, as counted by Microsoft Word.

/s/ Ryan D. Walters
RYAN D. WALTERS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on December 1, 2021, which automatically serves all counsel of record who are registered to receive notices in this case.

/s/ Ryan D. Walters
RYAN D. WALTERS